SARWARI AINUDDIN

v.

ABDUL AZIZ AINUDDIN

HIGH COURT SHAH ALAM
MAHADEV SHANKAR JCA
[CIVIL SUIT NO: 22-183-1991]
1 DECEMBER 1995

CIVIL PROCEDURE: *Execution - Stay - Impecunious party - Whether sufficient to show appeal would be rendered nugatory - Whether amounts to a special circumstance - Whether risk of dissipation confined to the poor*

CIVIL PROCEDURE: *Execution - Stay - Discretionary remedy - Long trial costing aged plaintiff substantial costs - Whether plaintiff should not be deprived of fruits of litigation - Whether decision on stay of execution cannot be treated as binding judicial precedent*

CIVIL PROCEDURE: *Execution - Stay - Order for partial stay made by court - Whether same court may give limited stay pending application for stay at appellate court - Whether court functus officio*

CIVIL PROCEDURE: *Execution - Stay - Undertaking to reimburse defendant if appeal successful - Whether appropriate for court to direct plaintiff to give such undertaking after disallowing application for stay - Whether defendant can proceed by other means if appeal successful*

CIVIL PROCEDURE: *Pleadings - Statement of claim - "Any other relief as may be just" - Whether such plea allows court to grant interest although interest not prayed for - Whether such plea empowers court to give any relief required to do equity*

CIVIL PROCEDURE: *Interest - Interest upon interest - Decretal amount consisting of capital amount and accrued interest up to date of judgment - Whether ordering of interest upon decretal amount until realisation amounts to ordering interest upon interest - Whether prohibited by s. 11(a) Civil Law Act 1956*

Having found that the plaintiff was deprived of her inheritance, the court assessed the value of the same and ordered the defendant to pay her the assessed value. Interest thereon from the date of the plaintiff's entitlement up to the date of the judgment was also ordered. Additionally, the court ordered the total judgment sum to attract interest at 8% p.a. until settlement by the defendant. This was the defendant's application for a stay of execution of these

orders pending appeal. The grounds relied on by the defendant were: (i) since the plaintiff was impecunious, the appeal, if successful, would be nugatory; (ii) since the plaintiff had waited some 41 years to make her claim, she would not be prejudiced by having to wait a little longer; and (iii) the court had erred in allowing interest upon the capital amount from the day on which the plaintiff's cause of action arose and then allowing 8% p.a. upon the decretal amount - which was the sum total of the capital amount and accrued interest up to the date of judgment - since no interest was prayed for in the statement of claim and also because s. 11(a) of the Civil Law Act 1956 prohibits interest upon interest.

As the court went on to decide against the defendant, counsel for the defendant informed the court that an application to the Court of Appeal for a stay of execution would be made forthwith and thus he applied for a limited stay until the proposed application to the Court of Appeal had been heard. Counsel also applied for the court to direct the plaintiff to give an undertaking that in the event of the appeal succeeding, the plaintiff would refund the sum paid to her.

Held:

[1] The court has an absolute and unfettered discretion to grant or refuse an application for stay. This discretion must be exercised within the parameters. Subject to that limitation, every decision on stay of execution being an exercise of judicial discretion can only be a decision on its own facts and cannot be treated as judicial precedent and binding.

[2] The onus of showing that an appeal would be rendered nugatory unless a stay is granted is upon the defendant. It is not enough to say that the plaintiff is poor. It has also to be shown that if the money is paid over, there is no reasonable probability of getting it back.

[3] Poverty of the plaintiff by itself is not a special circumstance except where there was no reasonable probability of getting the money back if the appeal succeeded. It is not enough to contend that the plaintiff is impecunious and therefore incapable of making reimbursement. Evidence has to be adduced to prove that it is so. The court cannot infer from the plaintiff's alleged poverty that she is the kind of person who is predisposed to dissipating all her assets. This would, however, be the case if it was shown that she was a person of such intemperate habits that she would, immediately upon receipt of the cash, put it beyond the reach of the defendant. On the evidence as presented, the court is in no position to say that in two or four years' time the plaintiff will be worthless, even if it is difficult to say how much she will then be worth.

[4] At best, what can be said here is that there is a risk that the plaintiff will spend the money on intangible assets, or make some really bad investments. On the other hand, if the plaintiff invests her money wisely or even if she is just lucky, she could even increase her wealth in the next few years. The law must be the same for everybody. The risk of dissipation is not confined to poor people. Indeed, it could be demonstrably proved that people who are wealthy also embark upon disastrous financial ventures. A universal risk is not a special circumstance. A very real risk may be, depending on the facts of the case, but it has to be shown that there is something here which takes the matter out of what is ordinary. Otherwise, a stay of execution of a money judgment will be automatic in all cases where the money is in court.

[5] The advanced age of the plaintiff is just as good a reason for putting her in funds immediately. What use is her victory to her personally after she becomes infirm or has passed on. The court also took into consideration that this was a very long trial, that many of the plaintiff's witnesses came from abroad and that the legal costs would have been very substantial, more so since there will be the costs of the appeal.

[6] The statement of claim prayed for any other relief as may be just. These words are not just ornamental. In fact, they empower the court to give any relief which is required to do equity.

[7] No part of the plaintiff's claim against the defendant represented contractual interest. What she claimed was the value of the inheritance, which she was deprived, at current rates. The court could not give her the land back because it had been sold to a third party. Therefore, the court had to replace it with a sum of money the quantum of which had to include an interest element. Had the plaintiff got her inheritance at the time she was entitled to it, she could have earned interest upon that capital and she must be compensated for that loss. The decretal sum thus arrived at is what the defendant has to pay by way of restitution for what the plaintiff had lost. Theoretically, the plaintiff should have been paid the decretal sum on the day of judgment. It is notional capital in her hands and the court sees no reason why interest at 8% p.a. should not be awarded to her on this amount until realisation.

[8] It is not open to this court to grant the limited stay requested because once the court had made an order for partial stay, the matter was closed and this court was functus. In any event, to grant a limited stay would be inconsistent with the order the court had already made.

[9] The court is not vested with any jurisdiction to direct the plaintiff to give the sort of undertaking the defendant requested. In fiscal terms, the fruits of the plaintiff's litigation simply means that the money paid to her is hers unless a higher court directs otherwise. The plaintiff is free to enjoy it in any manner she pleases. Indeed it would be pointless to require an undertaking because the order of the appellate court, if the defendant succeeds, must be that the plaintiff will have to repay the sum she had received. If the plaintiff does not comply, the defendant will be at liberty to enforce that order by execution or other due process.

[Applications dismissed.]

Case(s) referred to:
Bushwell Properties v. Vortex Properties [1975] 2 All ER 214 ***(refd)***
Che Wan Development Sdn Bhd v. Co-operative Central Bank Bhd [1989] 2 CLJ 584 ***(refd)***
Hong Kong & Shanghai Banking Corporation v. Chan Oi Lan [1991] 3 CLJ 2092 ***(refd)***
Lee Kuan Yew v. Jayaretnam JB [1991] 1 MLJ 83 ***(refd)***
Lim Eng Kay v. Jaffar Mohd Said [1982] 2 MLJ 156 ***(refd)***
Mohamed Mustafa v. Kandasami (No. 2) [1979] 2 MLJ 126 ***(refd)***
Orion Property Trust & Ors v. Du Cane Court Ltd [1962] 3 All ER 466 ***(refd)***
Syarikat Berpakat v. Lim Kai Kok [1983] 1 MLJ 406 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 11(a)
Rules of the High Court 1980, O. 47 r. 1

Other source(s) referred to:
The New Shorter Oxford Dictionary

For the plaintiff - Gunaseelan; M/s Wan Majid & Mano
For the defendant - Lopes; M/s Kamaruddin & Partners

Reported by S Dharmendran

JUDGMENT

Mahadev Shankar JCA:

This is an application by the defendant for a stay of execution pending appeal.

The plaintiff is now 67 years old. Her father died intestate in 1944. The defendant took out letters of administration in 1948, and effectively distributed the entire estate between himself and his brothers pursuant to a distribution order he obtained in 1949. The plaintiff was thus deprived of her inheritance. I valued this as at the date of judgment at RM547,847.21. I also ordered that

the plaintiff be paid interest thereon from the date of her entitlement up to the date of my judgment. This came to another RM131,483.28. I then added these two sums to make up the decretal amount and ordered that the defendant pay 8% p.a. thereon until realisation. It is this order the defendant now seeks to stay.

The defendant sold some of the lands he inherited from his father's estate and bought another estate in Batang Kali, which he registered in the names of himself and his son. When he was about to sell this estate, the plaintiff obtained an *ex parte* injunction restraining him for doing so. This injunction was set aside by consent upon terms that the defendant's half-share of the sale proceeds be put on fixed deposit and the receipts be placed in the custody of this court.

The issue as to whether a stay should be granted has been hotly contested. All the authorities have been reviewed by my brother YA NH Chan in *Che Wan Development Sdn Bhd v. Co-operative Central Bank Bhd* [1989] 2 CLJ 584; [1989] 3 MLJ 40, except the following:

(1) *Mohamed Mustafa v. Kandasami (No. 2)* [1979] 2 MLJ 126;

(2) *Orion Property Trust and Ors. v. Du Cane Court Ltd* [1962] 3 All ER 466

(3) *Lee Kuan Yew v. Jayaretnam JB* [1991] 1 MLJ 83

The core factors in this equation which emerge from these cases can be summarised as follows:

(1) The court will not deprive the successful party of the fruits of his litigation until an appeal is determined unless the unsuccessful party can show special circumstances otherwise;

(2) The validity or correctness of the decision appealed from are not special circumstances;

(3) Special circumstances are circumstances which go to the enforcement of the judgment and not those which go to its validity or correctness. Merits or strong grounds of appeal are not special circumstances;

(4) Proof that a successful appeal would be nugatory is a special circumstance.

The courts have held that it is no small matter for a successful party to go without his damages for a long time, and that the property of the plaintiff by itself is not a special circumstance except where there was no reasonable probability of getting the money back if the appeal succeeded. It is not enough to contend that the plaintiff is impecunious and therefore incapable of making reimbursement. Evidence has to be adduced to prove that it is so.

Mr. Gunaseelan of counsel contended that because the plaintiff had traced the original assets of the deceased's estate into the Batang Kali Estate, the proceeds of the sale of the latter was infact part of the deceased's estate and therefore the order I made was for equitable restitution, and not a money judgment.

With respect I cannot agree. Order 47 r. 1 of the Rules of the High Court 1980 is clear. This is a money judgment and being so:

> the court may by order stay the execution ... either absolutely or for such period and subject to such conditions as the Court thinks fit.

In *Syarikat Berpakat v. Lim Kai Kok* [1983] 1 MLJ 406, YA Hashim Yeop Sani confirmed that the court "has an absolute and unfettered discretion to grant or refuse an application for stay".

This discretion must be exercised within the parameters. Subject to that limitation every decision on stay of execution being an exercise of judicial discretion can only be a decision on its own facts, and cannot be treated as judicial precedent and binding.

A word or two as to what is nugatory is not out of place. According to The New Shorter Oxford Dictionary it means "Trifling, of no value or importance, worthless, not valid, inoperative, useless, futile".

In his affidavit the defendant says the plaintiff is unemployed, does not own any property of any sufficient value and therefore the appeal will be nugatory. Other grounds urged are that she waited 41 year to make her claim and she would not be prejudiced if she waits a little longer.

The plaintiff's response is that although she is unemployed she is not a pauper. She avers that she has financed this litigation both in terms of legal expenses and valuation reports. She further avers that she did not at any time tell the defendant about her financial condition. She thus leaves it to be implied that the defendant's assertion that she does not own any property of value, is pure speculation. But she has not listed any of her assets. She also claims that if the defendant's claim is allowed, the result will be that the denial of justice which she has suffered all these years will be further perpetuated.

Charting a course between these contentious submissions, I would observe first of all that the onus of showing that the appeal will be nugatory unless the stay is granted is upon the defendant. It is not enough to say that the plaintiff is poor. It has also to be shown that if the money is paid over there is no reasonable probability of getting it back.

Can the court infer from her alleged poverty that the plaintiff is the kind of person who was predisposed to dissipating all her assets? This would indeed be the case if it was shown that she was a person-of such intemperate habits, that she would immediately upon receipt of the cash put it beyond the reach of the defendant.

But at best what can be said here is that there is a risk that the plaintiff will spend the money on intangible assets, or make some really bad investments. What worries me is that the law must be the same for everybody. The risk of dissipation is not confined to poor people. Indeed it could be demonstrably proved that people. Indeed it could be demonstrably proved that people who are wealthy also embark upon disastrous financial ventures. A universal risk is not a special circumstance. A very real risk may be, depending on the facts of the case, "but it has to be shown that there is something here which takes the matter out of what is ordinary. Otherwise a stay of execution of a money judgment will be automatic in all cases where that money is in court.

On the other side of the scales is the concept of not depriving a successful party of the fruits of his litigation. The purpose of the court order is to put those fruits into the plaintiff's mouth. Who is the defendant whom the court has found liable, to say that she should not be allowed to chew them. Everything else being equal can we be so bold as to predict upon whom dame fortune will shower her favours with the passage of time? If the plaintiff invests her money wisely or even if she is just lucky she could even increase her wealth in the next few years.

The advanced age of the plaintiff is just as good a reason for putting her in funds immediately. What use is her victory to her personally after she becomes infirm or has passed on. Indeed if this matter ends up in the Federal Court, a time frame of another three to four years for the final disposal of this case may not be unrealistic. The plaintiff may not be as rich as the defendant today. Indeed the plaintiff's counsel has blamed the defendant for her present financial status. But the point is that on the evidence as it has been presented, the court is in no position to say that in two or four years time the plaintiff will be worthless, even if it will be difficult to say how much she will then be worth.

I also have to bear in mind that this was a very long trial. Many of the plaintiff's witnesses came from India. The legal costs must have been very substantial. And now there will be the costs of the appeal.

These are some of the factors relevant to the absolute discretion I must now exercise. Mercifully it is not an all or nothing situation because O. 47 r. 1 permits a partial stay.

There is one last point to be got out of the way. The defendant contends that one of the grounds why stay should be ordered is that I have done something which is unlawful by allowing 1% p.a. interest upon the capital amount from the day on which the plaintiff's cause of action arose and then 8% p.a. upon the decretal amount consisting of the capital amount plus accrued interest up to the date of judgment, because:

(1) No interest was prayed for in the statement of claim;

(2) Section 11(a) of the Civil Law Act 1956 prohibits interest upon interest.

The short answer to the first objection is that the statement of claim prayed for any other relief as may be just. I agree with plaintiff's counsel that these words are not just ornamental. They empower the court to give any relief which is required to do equity. See YAA Tun Salleh Abas in *Lim Eng Kay v. Jaffar b. Mohd. Said* [1982] 2 MLJ 156 at 160. See also *Hong Kong & Shanghai Banking Corporation v. Chan Oi Lan* [1991] 3 CLJ 2092 at 2095.

The second objection is more apparent than real. Oliver J. had to deal with precisely the same point in *Bushwell Properties v. Vortex Properties* [1975] 2 All ER 214 at 225 where he said this:

> There is a further point in this connection which counsel for the defendants has raised. The amended statement of claim claimed interest under the Law Reform (Miscellaneous Provisions) Act 1934. Section 3(1) of the 1934 Act confers on the court a discretionary power to award interest on damages. Counsel for the defendants draws attention to the fact that the damages here claimed are calculated by reference to interest paid or lost and relates that fact to the provisions of proviso (a) to s. 3(l) where it is provided that 'nothing, in this section ... (a) shall authorise the giving of interest upon interest ...' Thus, he argues, in this case the court has no statutory discretion. I cannot accept this submission. It appears to me that the proviso was clearly aimed at the sort of case where an interest-bearing debt is sued for (for instance, a mortgage debt or an instalment of interest in arrear). In such a case the court is not to award interest on such part of the sum claimed as represents contractual interest. Although what is claimed here is simply a replacement of a sum of money, the quantum of which is calculated by reference to interest which the plaintiffs have had to pay, the sum so claimed is not in any relevant sense interest itself; it is the sum payable by way of damages for breach of contract, and I see no reason why it should not be capable of carrying interest in the ordinary way.
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> In my judgment, therefore, the discretion conferred by the 1934 Act remains exercisable. In as much as the plaintiffs have had to incur payments which have depleted their general funds, or have lost the use of money which would, had it not been paid out for the immediate purchase, have produced an addition to their general funds by way of interest earned, which addition would itself have been available to earn interest, I do not see why in principle interest under the 1934 Act should not be awarded ...

No part of Sarwari's claim against the defendant represents contractual interest. What she claimed was the 1949 value of the inheritance which she was deprived of in 1994 Ringgit. We could not give her the land back because it had been sold to a third party. So we had to replace it with a sum of money the quantum of which had to include an interest element. Had Sarwari got her inheritance in 1949 she could have earned interest upon that capital, and she must be compensated for that loss. The decretal sum thus arrived at is what the defendant has to pay by way of restitution for what the plaintiff has lost.

Theoretically Sarwari should have been paid the decretal sum on the day of judgment. It is notional capital in her hands and I do not see why interest at 8% should not be awarded to her on this amount until realisation.

However, whether the interest awarded was lawful or otherwise is not a matter for me but for the Court of Appeal, and I can only hope that my comment on point may be of some interest.

In all the circumstances of this case, I order that at the immediate next date of maturity, all the fixed deposit receipts now with the court be cashed and

(1) the sum of RM300,000 be paid out to the plaintiff in satisfaction *pro tanto* of her claim;

(2) The sum of RM75,000 be put on a new fixed deposit on monthly roll-over in the name of the plaintiff's solicitors and the fixed deposit receipt be lodged with the senior assistant registrar of this court to abide the taxation of the plaintiff's bill of costs. Upon extraction of the Allocatur this deposit shall be cashed upon the maturity date falling due immediately thereafter, and shall be paid to the plaintiff's solicitors in satisfaction *pro tanto* of such Allocatur;

(3) the balance sum after payment out of the RM300,000 and the provision of RM75,000 aforesaid, shall be placed upon a fresh fixed deposit in a bank in the joint names of the solicitors for the plaintiff's and the defendant on a three monthly roll-over basis and the receipt shall be lodged with the senior assistant registrar of this court. This money plus all accrued interest thereon shall be disposed off as directed by the Court of Appeal.

Finally I order that the costs of this application be taxed and await the outcome of the appeal.

Immediately after I read this judgment Mr. Lopes of counsel for the defendant indicated to the court that he had instructions to apply forthwith to the Court of Appeal for a stay of execution with a view to ensuring that no part of the

funds on fixed deposit be released to the plaintiff until the appeal was finally disposed of. He therefore applied for a limited stay of my orders until his proposed application to the Court of Appeal had been heard. He also applied for the court to direct the plaintiff to give an undertaking that in the event of the appeal succeeding the plaintiff would refund the sum paid to her. Mr. Gunaseelan of counsel for the plaintiff objected to both the applications. As to the first, he said it was in the nature of an Erinford injunction and should be refused because the court had already refused a total stay. As to the second, he initially said that it would be pointless for the plaintiff to give an undertaking. When Mr. Lopes interpreted this to mean that Mr. Gunaseelan had said that the plaintiff's undertaking was worthless, Mr. Gunaseelan explained that what he meant was that if the defendant succeeded in the appeal, he would have to sue the defendant for the return of the funds paid to her.

I gave my reasons orally for dismissing both applications and said I would put them down in writing since this matter is going for further consideration.

I do not think it is open to me to grant the limited stay requested because once I had made my order for partial stay the matter was closed and this court was functus. The application to the Court of Appeal for stay is not an appeal against my order of partial stay but a collateral application which will be treated on its own merits. In any event to grant a limited stay would be inconsistent with the order I have just made.

Secondly I do not think I am vested with any jurisdiction to direct the plaintiff to give the sort of undertaking the defendant requires. In fiscal terms the fruits of her litigation simply means that the money paid to her is hers unless a higher court directs otherwise. In my view the plaintiff is free to enjoy it in any manner she pleases. Indeed it would be pointless to require an undertaking because the order of the Appellate Court if the defendant succeeds, must be that the plaintiff do repay the sum she has received. If the plaintiff does not comply, the defendant will be at liberty to enforce that order by execution or other due process.

Accordingly I dismissed both applications and directed the senior assistant registrar to hand over the fixed deposit receipts to the plaintiff's solicitors so that the orders I had made could be carried out. I also gave general liberty to apply.